COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Complaint of Fiber Technologies Networks, L.L.C.	**)**	**D.T.E. 01-70**

SHREWSBURY'S ELECTRIC LIGHT PLANT'S OPPOSITION TO FIBER TECHNOLOGIES NETWORKS, L.L.C.'S MOTION FOR RECONSIDERATION AND CLARIFICATION

Pursuant to 220 C.M.R. 1.11(10), Shrewsbury's Electric Light Plant ("SELP") hereby files with the Department of Telecommunications and Energy ("Department") its opposition[1] to Fiber Technologies Networks, L.L.C.'s ("Fibertech") January 13, 2003 Motion for Reconsideration and Clarification ("Motion"). As discussed in detail below, the Department should deny the Fibertech Motion because (1) the Department consistently has held that reconsideration of interlocutory orders is not appropriate, and (2) the Motion clearly fails to meet the Department's standards for either motions for reconsideration or motions for clarification. Moreover, where the objective of Fibertech's Motion is to reargue issues which the Department already has ruled upon in order to avoid producing documents which both the Hearing Officer and the Department have ordered Fibertech to produce, SELP urges the Department to reject the Fibertech Motion as soon as practicable.

[1] Pursuant to 220 CMR 1.11(10), parties to a Department proceeding "shall be afforded a reasonable opportunity to respond to a motion for reconsideration." On January 15, 2003, SELP advised the Department that a two-week period – until January 27, 2003 -- would afford SELP a "reasonable opportunity" to respond to Fibertech's Motion. On January 16, 2003, the Hearing Officer established January 27, 2003 as the deadline for SELP's response to Fibertech's Motion.

PROCEDURAL HISTORY

1. On December 24, 2002, the Department issued an Interlocutory Order on Fibertech's (1) February 19, 2002 appeals from a February 14, 2002 Hearing Officer Ruling,[2] and (2) Motion for Summary Judgment[3] ("Interlocutory Order"). In its Interlocutory Order, the Department (1) denied Fibertech's Motion for Summary Judgment in part and granted said Motion in part, and (2) affirmed the February 14, 2002 Hearing Officer Ruling.

2. In affirming the February 14, 2002 Hearing Officer Ruling with respect to SELP's Motions to Compel, the Department also ordered Fibertech to produce the documents requested by SELP within fourteen (14) days of the Order. Interlocutory Order at 45-46, 47.

3. Fibertech failed to produce responses to SELP's information requests by January 7, 2003, the deadline imposed by the Department. On January 10, 2003, three full days after the Department's deadline had come and gone, Fibertech filed with the Department a Motion for Extension of Time to Respond to SELP's Discovery Requests ("Motion to Extend"). In support of its Motion to Extend, among other things, Fibertech argued that its forthcoming motion for reconsideration "may obviate the need for some or all of the discovery requests at issue…." Motion to Extend at 2-3.

4. On January 13, 2003, Fibertech filed its Motion for Reconsideration and Clarification.

5. On January 16, 2003, SELP filed its Opposition to Fibertech's Motion to Extend, noting, among other things, that the open-ended nature of the Motion to Extend, along with Fibertech's preview

[2] On February 14, 2002, the Hearing Officer granted SELP's November 20, 2001, November 28, 2001, and January 24, 2002 Motions to Compel responses to certain outstanding information requests, and denied Fibertech's November 28, 2002 Motion to Compel discovery responses ("February 14, 2002 Hearing Officer Ruling").

[3] On March 1, 2002, Fibertech filed a Motion for Summary Judgment. On March 22, 2002, SELP filed its Opposition to the Motion for Summary Judgment.

of its then yet-to-be-filed Motion for Reconsideration, was designed to avoid submitting responses to information requests which the Interlocutory Order had required Fibertech to produce.

I. Reconsideration is Unavailable for Interlocutory Orders.

The Department's Procedural Rules and Regulations make clear that a motion for reconsideration may be filed only in connection with a "final Department Order." 220 CMR 1.11(10). In this proceeding, Fibertech seeks reconsideration of the Department's Interlocutory Order on summary judgment. It is a well-settled premise of civil procedure that any order that adjudicates fewer than all the claims of the parties is interlocutory in nature. Mass.R.Civ.P 54(b). This premise is recognized by the Department, who has found that "[t]he term 'interlocutory' is defined as something intervening between the commencement and the end of a proceeding which decides some point or matter, but is not a final decision of the whole controversy. Black's Law Dictionary." Boston Edison Co., D.P.U. 96-23-A at 6 (1997). The Department's Interlocutory Order in this case does not make any final disposition regarding Fibertech's complaint. Therefore, there is no basis under the Department's rules and regulations for Fibertech's motion for reconsideration to be considered.

In fact, "[t]he Department has repeatedly held that 220 C.M.R. § 1.11(10) limits reconsideration to final Department Orders, not interlocutory Orders." Interlocutory Order, Total Element Long-Run Incremental Costs for Unbundled Network Elements, D.T.E. 01-20, at 3 (October 18, 2001) ("TELRIC Order"). The Department has recognized that the rule on reconsideration is based on the principle of administrative efficiency. Boston Edison Co., D.P.U. 96-23-A at 6. The Department has previously stated in connection with motions for reconsideration of interlocutory orders:

> Granting reconsideration of an interlocutory Order would be a considerable departure from both our procedural rules and past precedent, and would require, at a minimum, a strong showing by the

> moving party that such a departure is not merely reasonable, but necessary for the orderly administration of this proceeding.

TELRIC Order at 3-4.

The Department's precedent makes clear the need for administrative efficiency that is addressed by its rule on interlocutory orders, noting that the principles behind the rule (ability to make final determinations and carry out its regulatory duties without being hampered by reconsideration of every procedural and interlocutory decision) are supported under the Massachusetts Administrative Procedure Act ("APA"), G.L. c. 30A. Boston Edison Co., D.P.U. 96-23-A at 7. The Department's rule is consistent with the APA, which provides that administrative agency actions and rulings which are procedural or interlocutory in nature are not immediately reviewable under G.L. c. 30A, § 14, and that only after a final decision is entered in an adjudicatory proceeding are such rulings reviewable. Id; see also, G.L. c. 25, § 5 (appeals permitted only from final decisions or orders of the Department.)

Consistent with the utter disregard for the Department's procedural rules and regulations that it has demonstrated throughout this case,[4] Fibertech never even tries to justify its basis for filing for reconsideration of an interlocutory order, and does not bother to seek leave to deviate from the requirements of 220 CMR 1.00. See 220 CMR 1.01(4). Nor could it; Fibertech can invoke no good cause to deviate from the Department's rule and well-established precedent on reconsideration of interlocutory orders.[5] Accordingly, Fibertech's Motion for Reconsideration should be denied outright.

II. Even if the Department Were to Consider Fibertech's Motion, It Would Fail

[4] See Fibertech's Motion to Extend Time to Respond to Discovery Requests (January 10, 2003) (submitting motion after deadline for filing responses); see also Interlocutory Order at 2, n.4 (submitting a reply to SELP's responses without seeking leave to reply).

[5] The fact that Fibertech is unhappy with the outcome is insufficient to provide a basis for reconsideration. While SELP disagrees, in part, with the Department's Interlocutory Order because it believes that dark fiber cannot, as a

Even if the Department were able to review Fibertech's motion for reconsideration of an interlocutory order, Fibertech's motion fails to meet the Department's well-established and oft-repeated standard of review for reconsideration:

> Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987). A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983).

Boston Edison Co., D.P.U. 96-23-A at 6-7. Fibertech's motion for reconsideration does not bring to light any previously unknown or undisclosed facts; indeed, its motion is nothing more than an attempt to reargue its summary judgment motion using a different tack. By Fibertech's own admission, the basis for its motion is the Department's failure to consider the "evidence in the record that the custom or practice in the telecommunications industry is to have pole attachment agreements and licenses in place before obtaining municipal grants of location."

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matter of law, qualify as an "attachment" under G.L. c. 166, § 25A, this is neither the place nor the time to raise that issue; that issue is something to be addressed only on appeal of any final decision in this matter under G.L. c. 25, § 5.

Motion at 3. Accordingly, Fibertech argues that the basis for reconsideration is not a previously unknown or undisclosed fact, but instead the alternative ground of "mistake or inadvertence." See e.g., Berkshire Gas Co., D.T.E. 98-129-A at 3 (1999).

As demonstrated below, there is no basis for reconsideration in the Department's Interlocutory Order. The Department's Interlocutory Order makes abundantly clear that there is a genuine issue of material fact in dispute -- that being, whether Fibertech qualifies as a "licensee" under G.L. c. 166, § 25A. The Department has considered, and dismissed, Fibertech's arguments that Fibertech's alleged "common carrier" status means that it is a "licensee" as a matter of law. Fibertech's incorrect attempt to raise a new argument, *i.e.*, industry practice, and its attempt to argue that the burden of proof shifted to SELP to address this new argument that was raised the first time via Fibertech's Motion for Reconsideration, is frivolous and not asserted in good faith.

III. There was No Mistake or Inadvertence in the Department's Interlocutory Order.

In support of its motion, Fibertech identifies no errors in the Department's Interlocutory Order that rise to the level of "mistake or inadvertence." The "evidence" that Fibertech claims the Department overlooked consists of the pre-filed testimony of Frank Chiaino, the relevant excerpt from which is reproduced in Fibertech's Motion *for the first time.* Indeed, in its Motion for Reconsideration, Fibertech apparently abandons its "common carrier-equals-licensee" argument (and SELP notes that Fibertech does not seek reconsideration of that finding by the Department) and has now resorted to "evidence" of industry practices to support its Motion for Summary Judgment—retroactively, of course. Fibertech then chides the Department for not holding SELP to its "burden" of producing "evidence" to contradict the new Chiaino "evidence" -- submitted not in support of its original Motion for Summary Judgment, but in its Motion for Reconsideration.

Fibertech's so-called "evidence" that the Department has allegedly overlooked consists of Mr. Chiaino's statement that two other utilities in Massachusetts did not require Fibertech to "obtain local municipal authorizations prior to obtaining attachment agreements." Motion at 4. While Chiaino purports to testify as to industry standard, he actually only testifies as to the "normal pattern *for Fibertech* [emphasis added]." Id. There are several significant problems with Fibertech's arguments in this regard. First, this is the very first time Fibertech has raised these arguments. A party cannot raise on reconsideration that which it did not set forth in its Motion for Summary Judgment and memorandum, which the Department reviewed in issuing its Interlocutory Order. Presumably, Fibertech views it as the Department's or SELP's burden to rifle through the papers filed by Fibertech in this case to find some justification for its Motion for Summary Judgment, which arrived at the Department unaccompanied by any affidavits, discovery responses or the like in support. (In fact, in its Motion for Summary Judgment, Fibertech instead argued that only Department authorization was necessary to permit Fibertech to construct its lines in and over the public way under G.L. c. 166, §§ 21 and 22.)

Second, contrary to what Fibertech asserts, there is no "evidence in the record" in support of Fibertech's Motion for Summary Judgment. Pursuant to the Department's procedural rules, "a motion for summary judgment shall set forth in detail such supporting facts as would be admissible in evidence." 220 CMR 1.06(6)(e). At this point in time, in this case, it is unlikely Mr. Chiaino's testimony would be admissible in evidence, particularly due to his refusal to answer any of the discovery that the Department has ruled is relevant – indeed, central -- to this dispute, and is directed right at the assertions that he makes in his testimony.[6] Interlocutory Order at 43-46. Fibertech is offering Mr. Chiaino's pre-filed

[6] Indeed, Fibertech does not seek reconsideration of that portion of the Interlocutory Order addressing SELP's Motions to Compel. Thus, there would appear to be no basis for Fibertech's Motion to Extend Time to Respond to

testimony as the basis for its Motion for Reconsideration when: Mr. Chiaino has never been sworn under oath regarding such testimony; his testimony has not been subject to the rigors of cross-examination; and he has refused to respond to most discovery requests pertaining to the portions of his testimony pertinent to this dispute, and which the Department has ordered him to answer. Finally, because a hearing has not yet been held in this case, Mr. Chiaino's testimony has never been offered as an exhibit, let alone admitted into the record in this case. See 220 CMR 1.10(1), (4). Thus, Fibertech's attempt via a Motion for Reconsideration to raise (for the first time) Mr. Chiaino's self-serving statements as to Fibertech's practices, and Fibertech's sweeping conclusion that what Fibertech does is the *de facto* "industry standard",[7] is, contrary to what Fibertech asserts, not "evidence in the record."

Third, Mr. Chiaino's pre-filed testimony on Fibertech's past practice is irrelevant to the Department's resolution of a ***question of law***: whether Fibertech must be "authorized" to construct in the public way in order to qualify as a "licensee" under G.L. c. 166, § 25A. The Department certainly does not need Mr. Chiaino's non-expert opinion on how to resolve that question, and its failure to consider it (even when not raised by Fibertech in its Motion for Summary Judgment) is hardly mistake or inadvertence. The fact that Fibertech apparently has not followed the law on this matter under G.L. c. 166, §§ 21 and 22, and that no one has taken Fibertech to task for it, is not relevant to this case. Clearly then, the Department was not in error

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Discovery Requests, and Fibertech should be ordered to produce the document immediately or face dismissal, with prejudice. If Fibertech were in Court on this matter, such actions would likely lead to sanctions against it.

[7] The value of Fibertech's understanding of "industry practices" is specious at best. For example, most companies do not attach their lines to utility poles under the cover of darkness without prior permission from the utility pole owners first, but because Fibertech does so, would it claim that this is the industry practice as well? See Fiber Technologies Networks, L.L.C., D.T.E. 02-47, at 1 (2002).

for failing to discuss the Chiaino statements or rely upon them in its Interlocutory Order.

Fibertech also appears to argue that the Department was mistaken in its partial denial of Fibertech's Motion for Summary Judgment because "SELP submitted nothing to controvert this testimony and background." Motion at 4. Perhaps Fibertech is unaware of the provisions of Mass.R.Civ. P 56(f). Fibertech holds the key to -- and has the obligation to provide -- information that would demonstrate whether it can *ever* qualify as a "licensee" under Massachusetts law, yet it steadfastly refuses to provide that information through discovery, even though it has been ordered by the Hearing Officer and Commission. Fibertech has consistently resisted providing any information to SELP or the Department that would tend to show exactly what type of business Fibertech is engaged in. This critical point was fully explained in SELP's Response to Fibertech's Motion for Summary Judgment (e.g., SELP's Response to Fibertech's Motion for Summary Judgment at 14-15), and completely ignored by Fibertech. However, because Fibertech failed to provide any information pertinent to the nature of its business in response to SELP's discovery, SELP has no information, through no fault of its own, to respond to the arguments made by Fibertech and based on Chiaino's uncorroborated statements. See Mass.R.Civ.P 56(f); Interlocutory Order at 24, n.22.

However, SELP was under no obligation to address anything other than what was addressed by Fibertech in its Motion for Summary Judgment. Fibertech has the burden of demonstrating that there is no genuine issue of material fact, that a hearing could not affect the Department's decision in this matter, and that Fibertech is entitled to judgment as a matter of law on the "licensee" issue. See Interlocutory Order at 4-5. Here, Fibertech argues that it is entitled to summary judgment because

industry practice[8] shows that a "licensee" is not required to receive authorization from the local board of selectmen prior to seeking a pole attachment license from a utility under G.L. c. 166, § 25A. Previously, Fibertech argued in its Motion for Summary Judgment and Reply that its Statement of Business Operations and tariffs on file at the Department were sufficient to demonstrate its status as a "licensee." Neither argument can save Fibertech's futile attempts to avoid answering discovery and dispose of this matter in summary fashion.

The Department has determined that as a matter of law, Fibertech must demonstrate that it is a "licensee" in order to seek an attachment under 220 CMR 45.00. In order for Fibertech to show that it is a "licensee," it must demonstrate that it is authorized to construct in the public way under G.L. c. 166, § 22. In order for Fibertech to be authorized, it must be the type of company entitled under G.L. c. 166, § 21 to petition the local authorities for grants of location. Interlocutory Order at 43. That type of company is one that is "incorporated under the laws of another state for the transmission of intelligence… and which is engaged in interstate commerce within the commonwealth." G.L. c. 166, § 21. Fibertech has not proven it is such a company. The Department's Interlocutory Order could not be simpler to understand. Interlocutory Order at 43-44. Even though it is not SELP's burden at this point (in light of Fibertech's failure to make the argument that there is no genuine issue of material fact that it is engaged in the transmission of intelligence in interstate commerce), SELP could not produce countervailing affidavits or documents even if Fibertech had raised this issue, because Fibertech has refused to answer any discovery regarding its business operations and leases, which goes to the very point of whether it is a "licensee" under the applicable statutes.

[8] Questions of admissibility and weight aside, Fibertech actually does not provide any information on the industry; it merely submits excerpts of Chiaino's unsworn testimony regarding Fibertech's practice and custom in its Motion for

Finally, Fibertech also cannot show that the Department somehow committed an error of law via its Motion for Reconsideration. That argument cannot be made until a final decision is issued. In any event, Fibertech claims that the Department is mistaken in its Interlocutory Order when it "appears to assume that the grant of a pole attachment license confers actual access, and not just the right of access as against the utility." Motion at 6. Fibertech cites absolutely no support for its argument that pole attachment licenses do not confer actual access to poles. There is no such thing as a "generic" right of access proceeding against a utility pole owner under G.L. c. 166, § 25A or 220 CMR 45.00. If there was, the process under the regulations would be absolutely chaotic. A licensee would have to first file for its "generic right of access" and then if the utility pole owner later denied a specific request for attachment based on safety or reliability standards, the licensee would then have to file yet a second petition under 220 CMR 45.00.

The statute and regulations make abundantly clear that a pole attachment license confers actual access to the licensee as long as grants of location have been obtained. Under the statute and its regulations, the Department can dictate reasonable rates, and terms and conditions for specific agreements. In order for utilities to make denials of access based on safety, capacity, engineering or reliability standards, licensees would have to make specific pole attachment requests.[9] Further, the regulations envision that the Department might have to entertain disputes arising from modifications to attachments made by licensees, or from notices by utilities to licensees to remove certain attachments. See 220 CMR 45.03(2),(3).

Reconsideration.

[9] Typically, when making a pole attachment request, a licensee will provide, at a minimum, a listing of the poles it will need to attach to in a utility's service territory.

There is nothing in G.L. c. 166, § 22 that requires Fibertech to seek actual pole locations if it is attaching to poles that are already lawfully constructed by a utility. Because Fibertech is seeking to attach to existing poles, it will need to *seek permission to construct its wires* over the public way pursuant to G.L. c. 166, § 22, and the statute provides for wire and conduit locations just as it provides for pole locations. The statute makes it clear that grants of locations can be obtained for wires. Obviously, the actual pole locations have already been obtained by the pole owner. Contrary to Fibertech's assertions, it does not have to seek permission from the Board of Selectmen again, if it negotiates a license with the pole owner. It is the pole owner that petitions the Board of Selectmen for an increase in the number of wires on its poles.[10]

Accordingly, Fibertech fails to demonstrate any mistake or inadvertence on the part of the Department in issuing its Interlocutory Order, and its Motion should be denied.

IV. Fibertech's Motion Utterly Fails to Meet the Department's Standards for Motions for Clarification and Represents Yet Another Desperate Attempt to Avoid Producing Necessary Documents.

Fibertech's Motion for Clarification represents yet another attempt to avoid producing documents that both the Hearing Officer and Department previously have determined are necessary for purposes of this proceeding. The Department has articulated a clear standard for motions for clarification: Clarification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is so ambiguous as to leave doubt as to its meaning. Boston Edison

[10] See second paragraph of G.L. c. 166, § 22. SELP is not required to do this under G.L. c. 166, § 22 because it is not a "company." Howard v. Chicopee, 299 Mass. 115, 122 (1938). Thus, in the case of a company seeking to attach to

SELP's poles, once the grant of location is received, no steps other than a license agreement are necessary in order to effectuate final attachment.

Company, D.P.U. 92-1A-B at 4 (1993), Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-335-A at 3 (1992), *citing* Fitchburg Gas & Electric Light Co., D.P.U. 18296/18297, at 2 (1976), Fitchburg Gas & Electric Light Co., D.T.E. 97-115/98-120-A at 2 (1999).

Fibertech's Motion for Clarification fails to meet any of the elements of the Department's standard of review as is required for motions of this kind. First, the Department's Interlocutory Order is by no means "silent on a specific issue requiring determination in the order." On the contrary, even a cursory review of the Department's Interlocutory Order reveals that the Department understands fully the requirements of G.L. c. 166, § 25A and 220 CMR 45.00 *et seq.*, and has parsed and addressed the issues raised by Fibertech's Complaint and Motion for Summary Judgment consistent with its statute and regulations. While Fibertech expresses confusion regarding the Department's findings, the Department sets out its standard of review at the outset of its Interlocutory Order:

> The Department's Pole Attachment Regulations state that a utility must provide a "licensee" with nondiscriminatory access to place "attachments" on its poles, ducts, conduits, or rights-of-way, but that the utility may deny a licensee access for "valid reasons of insufficient capacity, reasons of safety, reliability, generally applicable engineering standards, or for good cause shown." 220 CMR §§ 45.02, 45.03; see also G.L. c. 166, § 25A. Neither party has alleged that SELP's denial of Fibertech's request for attachment was based on reasons of insufficient capacity, safety, reliability, or engineering standards. Therefore, after setting forth the standard of review and describing the generally undisputed facts below, we review whether Fibertech has demonstrated first that it qualifies as a "licensee," and second whether the facilities that Fibertech seeks to install on SELP's poles and conduits qualify as "attachments."

Interlocutory Order at 3. The Department then proceeds in its Interlocutory Order to address (1) whether Fibertech is a "licensee" (Interlocutory Order at 9-25), and (2) whether dark fiber is an "attachment" (Interlocutory Order at 25-29).

With respect to the "licensee" issue, the Department's Interlocutory Order includes clear and explicit findings and provides a detailed "road map" for the remainder of this proceeding. The Department holds first that "[B]ecause the Board of Selectmen [of Shrewsbury] has not granted Fibertech's petition for a grant of location, the Department cannot hold that Fibertech is authorized to construct lines across public ways for purposes of G.L. c. 166, § 25A." Interlocutory Order at 24. The Department, however, states that it will "proceed with its review of Fibertech's complaint on the sole issue of whether Fibertech is incorporated for the transmission of intelligence" (Interlocutory Order at 24-25), having previously held that "Fibertech's registration as a common carrier is not conclusive evidence of its status as a licensee and does not demonstrate that it is in the business of transmission of intelligence, and because the parties have not submitted sufficient evidence on the nature of Fibertech's business,…." (Interlocutory Order at 24 [footnote omitted]). Finally, in an effort to obtain sufficient evidence on the nature of Fibertech's business, the Department clearly directs Fibertech to submit responses to specifically enumerated information requests within fourteen (14) days of its Interlocutory Order[11] – a directive which Fibertech has failed to carry out, opting instead to file a late motion to

[11] In fact, in requiring Fibertech to submit information responses relative to the nature of its business, the Department offers Fibertech the option of waiving the argument that it is "a company incorporated under the laws of another state for the transmission of intelligence by electricity or telephone or television, whether by electricity or otherwise, and which is engaged in interstate commerce within the commonwealth," in lieu of producing documents pertaining to its operations outside Massachusetts" (Interlocutory Order at 45-46 (emphasis in original)). Here, the Department has gone beyond its typical approach in matters of this kind and has mapped out alternative strategies for Fibertech in excruciating detail – detail which Fibertech appears to be "at a loss" to understand.

extend the deadline for submitting its responses.[12] Indeed, there is nothing unclear with respect to the Department's determinations relative to the "licensee" issue, and the Department is similarly clear with respect to its plans and expectations for the remainder of this proceeding.

Second, the Interlocutory Order does not contain – nor does Fibertech allege that it contains – "language that is so ambiguous as to leave doubt as to its meaning." Absent a reference to specific language – ambiguous or otherwise – it is difficult to determine what exactly Fibertech seeks to clarify. Of course, upon review of Fibertech's latest motion it becomes clear that Fibertech does not truly seek clarification of anything, but instead inappropriately seeks reconsideration of the Department's Interlocutory Order.

Finally, in articulating its standard of review for motions for clarification, the Department states that clarification "does not involve reexamining the record for the purpose of substantively modifying a decision." Here, Fibertech's instant Motion seeks exactly that. In fact, Fibertech's failure to include in its Motion either a recitation of the Department's standard of review for motions for clarification, argument as to why Fibertech meets that standard, or specific language that Fibertech seeks to clarify, only underscores that Fibertech's request for clarification is just another inappropriate vehicle for rehashing arguments and avoiding document production.

In the end, Fibertech is not the least bit confused with respect to the Department's Interlocutory Order. Rather, Fibertech is once again "pulling out all the stops" to avoid producing documents which first the Hearing Officer – and now the Department – has ordered Fibertech to produce. As Fibertech is well aware, a finding that dark fiber is an "attachment" under G.L. c. 166, § 25A is not tantamount to a finding that Fibertech is incorporated for the transmission of intelligence." As the Department stated

[12] See SELP's January 16, 2003 Opposition to Fibertech's Motion to Extend Time.

on page 29 of its Interlocutory Order, the question of who (licensee) may place attachments on poles is different than what (attachments) may be placed on poles. Try as it might, Fibertech cannot magically transform the Department's somewhat generic finding regarding dark fiber into a finding that Fibertech is in the business of doing anything – no less in the business of transmission of intelligence.[13] Similarly, no amount of adversarial "hocus pocus" or barely muted cries of confusion can change the fact that Fibertech has not provided SELP or the Department with even a shred of evidence about the nature of its business, products, services, customers, or proof that it is a licensee, and appears bound and determined to keep this docket free of any hard evidence about its business.

Fibertech's Motion for Reconsideration and Clarification is simply the latest in a long line of procedural tactics designed to save Fibertech from the task it appears to dread most – production of documents which are at the core of this proceeding. Indeed, Fibertech's efforts to date in this regard appear to be unprecedented, comprising objections to SELP's initial information requests, opposition to three SELP motions to compel, an appeal of the Hearing Officer's decision granting SELP's motions to compel, a motion for summary judgment, a motion to extend time to submit information responses consistent with the Department's Interlocutory Order upholding the Hearing Officer's ruling on the motions to compel, and this latest Motion. Unfortunately, Fibertech's relentless efforts to avoid document production serve no public interest, and instead serve only to drain the patience and resources of SELP and the Department. In SELP's view, after many months of delay and redundant arguments from Fibertech, the Department appears to be left with only one route – to order Fibertech to produce documents that SELP has sought for more than a year and

[13] As stated, SELP disagrees with the Department's finding that dark fiber is an attachment as a matter of law. In making that finding, the Department relies on rules regarding the provision of unbundled network elements ("UNEs")

even though companies such as Verizon are not obligated to provide UNEs to entities such as construction companies.

to require Fibertech to produce these documents by a date certain. The Department also should make it clear to Fibertech that failure to produce these documents will result in dismissal of Fibertech's Complaint. SELP respectfully notes that any action by the Department short of this suggested action will result only in further attempts by Fibertech to prolong this proceeding and avoid document production.

CONCLUSIONS

For the foregoing reasons, Fibertech's Motion for Reconsideration and Clarification should be denied; and Fibertech should be ordered by the Department to produce immediately responses to all outstanding discovery responses.

Respectfully submitted,

SHREWSBURY'S ELECTRIC LIGHT PLANT

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